PAN GLOBAL TEXTILE BHD. PENANG

v.

ANG BENG TEIK

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING MOTION NO. 25-15-1993]
20 SEPTEMBER 1994

INDUSTRIAL RELATIONS: Dismissal - Representations - Time for making representations to Director General - Section 20(1A) Industrial Relations Act 1967 - Whether a mandatory provision.

INDUSTRIAL RELATIONS: Industrial Court - Jurisdiction - Industrial Court adjudicated on matters not specifically referred by Minister - Whether a jurisdictional error - Whether award thereof a nullity - Industrial Relations Act 1967 ss. 20(3), 30(5).

INTERPRETATION: Section 30(5) Industrial Relations Act 1967 - Jurisdictional powers of Industrial Court as Court of equity and good conscience - Ambit of application - Whether Industrial Court to restrict itself to matters within the ambit of specific reliefs claimed in the industrial dispute referred by the Minister.

By a letter dated 21 January 1989 the applicant intimated to the respondent, its general manager, that investigation revealed that the respondent was guilty of gross misconduct and that a domestic inquiry would be held in that respect. On 2 May 1989, pursuant to the findings of the inquiry, the respondent was demoted to the position of manager of general affairs and was requested to report for duty on 3 May 1989. The respondent refused to assume his demoted post and thereafter absented himself from work in protest.

On 6 June 1989, after having sent two futile reminders to the respondent to report for work, the applicant terminated the respondent's employment stating "it is evident that you are no longer interested to be employed in our company" as reason for the termination.

On 20 July 1989, the respondent made representations to the Director-General of Industrial Relations, purportedly under s. 20(lA) Industrial Relations Act 1967 (the Act), complaining of the termination of his services. On 2 November 1990 the Honourable Minister referred the matter to the Industrial Court under s. 20(3) of the Act, stating "**the dismissal of En Ang Beng Teik**" as the specific matter for adjudication. The Industrial Court, having deliberated on the facts, ruled that there was in fact and in law constructive dismissal in this case and that the dismissal was wrongful and accordingly awarded the adjudication against the applicant.

The applicant applied to the High Court for an order of certiorari to quash the aforesaid award. Before the learned Judge the primary issue that arose was whether the Industrial Court, by considering the issue of constructive dismissal, had in fact deliberated on matters which were not referred to it and which the respondent had failed to refer to the Director-General within the stipulated 60 days period, and hence, had committed a jurisdictional error, such that its award herein was a nullity.

Held:

[1] The Industrial Court, being a creature of statute, derives its powers and jurisdiction solely from its founding statute and the terms of reference on which it functions are exclusively governed by references made to it by the Minister. As a Court of reference and to avoid falling into jurisdictional error, the Industrial Court therefore should only consider trade disputes that are referred to it. Although s. 30(5) of the Industrial Relations Act enjoins the Industrial Court to act according to equity and good conscience and substantial merits of the case without regard to technicalities and legal forms, this provision can only be invoked in its adjudication of the trade dispute specifically referred to it and not otherwise. In this case the Industrial Court had not only misconstrued the law but had also done or failed to do something in the course of its hearing which is of such a nature that its decision is a nullity.

[2]The Court had erred in law and in jurisdiction for having adjudicated on the question of constructive dismissal of the respondent when this question was not referred to it. The trade dispute that was referred to it was dismissal and not constructive dismissal. As an employee's relief against constructive dismissal and dismissal are entirely distinct and separate reliefs, both being available to the employee under the Act, it is therefore not open for the Industrial Court to deliberate on the question of constructive dismissal when the issue referred to it was dismissal.

[3] A representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first had official notice of the employer's act which is the essence of his complaint and which he seeks to impugn. In this case this would be when the respondent received the letter dated 2 May 1989 from the applicant company requesting him to report for duty on the demoted position of manager of general affairs on 3 May 1989, and at the very latest it should be when the remainder dated 12 May 1989 was written to him. The facts showed that the respondent did nothing on either dates and it was only 44 days after receiving the termination letter that the respondent made representations to the Director General of Industrial Relations. Thus on the facts and the admitted chronology of events, the respondent was clearly out of time under s. 20(lA) of the Act to make his claim for constructive dismissal, and it was not before the Industrial Court to make any finding on the matter.

[4] The Industrial Court had also erred in law and in jurisdiction for having held that there was a dismissal without just cause or excuse of the respondent's services with the applicant company when there was in fact and in law no dismissal. It is settled law that unless there is a sufficiently important breach of contract by the employer and the employee's action is in direct response to the employer's breach, an employee who leaves his work will be held to have resigned and there will be no dismissal within the meaning of the employment legislation. It is clear that in this case it was the respondent who had refused to report for work and by that had evinced an intention of not wanting to continue his employment with the applicant. This being so the letter of the applicant dated 6 June 1989 ought to be taken as an acceptance of the repudiation of the contract of employment. The respondent, by his failure to report for work, had dismissed himself, and the question of whether the "dismissal was without just cause or excuse by his employer" did not arise.

[Application allowed. Award of Industrial Court quashed].

Cases referred to:

Hotel Perdana Sdn Bhd (Kota Bharu) v. Puan Ruth Fam nee Chan Siew Peng (Kota Bharu) [1992] 1 ILR 172 ***(refd)***

National Union of Hotel, Bar & Restaurant Workers v. Rasa Sayang Beach Hotels (Pg) Bhd & Anor. [1988] 2 MLJ 367 ***(refd)***

Ernesty Sdn Bhd v. Transport Worker's Union & Anor. [1986]1 MLJ 18 ***(refd)***

Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1984] 1 MLJ 363 ***(refd)***

Malayawata Steel Berhad v. Mohd. Yusof bin Abu Bakar and Anor. [1994] 2 CLJ 239 ***(foll)***

Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 208 ***(foll)***

London Transport Executive v. Clarke [1981] 1 CR 355 ***(foll)***

Wong Chee Keong v. Cathay Organisation (M) Sdn. Bhd [1988] 1 MLJ 92 ***(refd)***

Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor [1988] 1 MLJ 111 ***(foll)***

Legislation referred to:

Industrial Relations Acts, ss. 20 (1A), 20(3), 30(5)

For the applicant - M. Nagarajah & Y. K. Leong; Riza Leong & Partners
For the respondent- N. Shanmugam; M/s.Shan & Gooi

JUDGMENT

Vincent Ng Kim Khoay J:

The relief sought by the applicant company was for an Order of Certiorari to quash the Industrial Court's award under Order No. 76/93 handed down on 8 March 1993 (said award) on the following grounds:

(a) The Industrial Court erred in law and jurisdiction in finding that the dismissal of the claimant was without just cause or excuse.

(b) The Industrial Court erred and committed a jurisdictional error by considering matters which were not referred to the director-general nor referred by the Honourable Minister to the Industrial Court.

(c) The Industrial Court erred in law and jurisdiction by misdirecting itself and making a decision over matters which the Court has not authority to do so.

(d) The Industrial Court erred in law and jurisdiction by considering matters which the Claimant had failed and/or chose not to refer to the director-general within sixty days.

(e) The Industrial Court failed to evaluate the evidence before it and misdirected itself in law in the proceedings by failing to confine its decision on matters arising from the letter dated 6 June 1989, which was the very issue referred to the director-general and by the Honourable Minister to the Industrial Court.

(f) The Industrial Court erred in law and jurisdiction by failing to consider the absence of the claimant from duty from 3 May 1989 continuing to 6 June 1989 whereby the claimant had dismissed himself from work.

(g) The Industrial Court erred in law and jurisdiction by failing to consider that the claimant had repudiated his contract of employment.

(h) The Industrial Court erred in law and jurisdiction when it held that the company had dismissed the claimant but in actual fact the company merely accepted the claimant's wrongful repudiation of his contract of employment which was confirmed in their letter dated 6 June 1989.

The respondent was employed as an assistant general manager by the applicant company on 9 May 1983 and subsequently promoted to the position of general manager on 10 May 1984. By a letter dated 14 May 1989, the applicant company issued a suspension letter to the respondent pending an investigation into an allegation of mismanagement by the respondent of the applicant company's affairs as its general manager.

By a letter dated 28 January 1989 the applicant company gave the following notice to the respondent.

Mr Ang Beng Teik
2 Jalan Kemuning
Off Jalan Raja Uda
Butterworth.

Dear Mr Ang

Re: Inquiry into the Conduct of the Affairs of Pan Global Textile Bhd by you a General Manager

We refer to our letter dated 14 January 1989 regarding the above matter.

Kindly note that preliminary investigation conducted by the company reveals gross misconduct on your part in the management of the company.

In view of the above the company has decided to conduct a domestic inquiry (on the allegations attached herewith) to ascertain its validity and to take the necessary actions in the event the allegations are found to the true.

You are hereby informed that the inquiry will take place on 20 February 1989 at 10.00 a.m. at the Penthouse, Wisma Pan Global, 110 Jalan Pudu, 55100 Kuala Lumpur. Your presence at the inquiry is vital and you are to bring along any witnesses who in your view will assist to prove your case.

At the inquiry you will be given full opportunity to conduct your defence by examining your witnesses and cross examining the company's witnesses. In this connection, you will be required to furnish the name(s) of your witnesses to the company at least one (1) week before the date of the inquiry. You may also bring along with you any other evidence that may help you in your defence.

Take notice that in event you fail to be present at this inquiry at the time, date and place indicated above, the inquiry shall be held in your absence.

Meanwhile your suspension from work with full pay will continue until further notice from the company.

Yours faithfully,

PanGlobal Textile Bhd

t.t.

Dato' Mak Kok
Managing Director

Acting pursuant to outcome of the domestic enquiry and findings of the enquiry panel, the applicant company informed the respondent by a lengthy letter dated 2 May 1989 ("Exh.R3" encl.13) that the allegations against him was proven to their satisfaction at the recent enquiry held and he was to be demoted to the position of manager (general affairs) and to report for duty on 3 May 1989.

Despite two letters sent by the applicant company to the respondent dated 12 May 1989 and 24 May 1989 requiring the latter to report for duty on the demoted position of general affairs manager in the company, the respondent refused to do so but instead wrote a reply dated 17 May 1989 to the first letter. The second letter stated as follows:

24 May 1989

Mr Ang Beng Teik,
2, Jalan Kemuning,
Off Jalan Raja Uda,
12300 Butterworth

Dear Mr Ang,

Re: Downgrading

We refer to your letter dated 17 May 1989 regarding the above matter.

2. Please note that the Company takes a serious view of the allegations contained in the second and third paragraphs of your aforesaid letter and hereby expressly reserves all rights accrued to the Company by reason of your said allegations.

3. In respect of the fourth paragraph of your said letter, kindly confirm in writing within seven (7) days from the date hereof whether you will abide by the Company's decision arising from the domestic inquiry held recently, failing which the Company shall have no alternative but to deem that you are no longer interested in the employment with the Company. The documents requested will be tendered at the proper time and at the right forum, if required.

4. We wish to reiterate that the said letter of 2nd May 1989 was personally handed to you by our Mr. Wong Swee Min on the said date. However without prejudice to the same, we enclose herewith a copy of the said letter.

5. Kindly note the urgency of the reply to paragraph 3 above and reply accordingly.

Yours faithfully,
PanGlobal Textile Bhd.

Sgd. Dato Mak Kok
Managing Director

By reason of the respondent's failure to report for duty the applicant company issued a letter of termination dated 6 June 1989 which reads:

Mr Ang Beng Teik
2, Jalan Kemuning
Off Jalan Raja Uda
12300 Butterworth.

By Hand & A.R. Registered

Dear Sir

Re: Downgrading

We refer to your letter dated 22 May 1989 and all other correspondence pertaining to this matter.

It is evident from these letters that you are no longer interested to be employed in our company. By reason thereof the company has no alternative but to inform you that your employment with the company is hereby terminated with immediate effect.

Kindly deliver to the company all the company's documents, effects and all other items belonging to the company within 48 hours from the date hereof failing which we shall proceed to take the necessary action.

As required under the provisions of the Income Tax Act, 1967, your salary for the month of May 1989 and from 1 June 1989 to 6 June 1989 will be withheld by us pending clearance from the Inland Revenue Department. We enclose herewith a copy of CP22A Form for your information and attention.

Yours faithfully
PanGlobal Textile Bhd.

Sgd.
Senior General Manager

encl.

KST/st

It is of crucial importance to note here that from 3 May 1989 until the date of the termination letter of 6 June 1989 i.e. for a period of 35 days, the respondent was absent from work. Then, 44 days after receipt of the termination letter, the respondent made representations (*vide* his letter dated 20 July 1989) to the Director-General of Industrial Relations complaining of the termination of his services with the applicant company. His complaint was specifically worded and the termination letter of 6 June 1989 was pointedly referred to. And, the Honourable Minister by a statutory reference dated 2 November 1990 referred the matter to the Industrial Court under s. 20(3) of the Industrial Relations Act (the act) for adjudication on "the matter of the dismissal of Encik Ang Beng Teik". The letter reads as follows:

Bil. (2) dlm.KSM.14/13/2
SJ (24 57

Tarikh: 2 Nov. 1990

Yang Di Pertua,
Mahkamah Perusahaan,
50544 Kuala Lumpur.

Tuan,

Rujukan ke Mahkamah Perusahaan oleh Y.B. Menteri Sumber Manusia mengenai pembuangan kerja Encik Ang Beng Teik oleh Pan Global E Textile Bhd., 4828, Mak Mandin Industrial Estate, 13400 Butterworth, Seberang Perai, Pulau Pinang pada 6 June 1989

Y.B. Menteri Sumber Manusia telah memutuskan perkara pembuangan kerja En. Ang Beng Teik dirujukkan ke Mahkamah Perusahaan di bawah Seksyen 20(3) Akta Perhubungan Perusahaan 1967, untuk satu keputusan.

2. Tarikh surat rayuan diterima oleh Jabatan Perhubungan Perusahaan ialah pada 20 July 1989.

Sekian,

"**Berkhidmat Untuk Negara**"

t.t.

(Abdul Kahar b. Abu Bakar)
b.p. Ketua Setiausaha
Kementerian Sumber Manusia.

s.k: Ketua Pengarah,
Perhubungan Perusahaan,
50536 Kuala Lumpur.

Pendaftar,
Mahkamah Perusahaan,
50544 Kuala Lumpur.

Pengarah,
Jabatan Perhubungan Perusahaan,
Bangunan Tuanku Syed Putra,
Downing Street,
10300 Pulau Pinang.

Pengurus,
Pan Global Textile Bhd.,
4828 Mak Mandin Industrial Estate,
13400 Butterworth, Seberang Perai,
Pulau Pinang.

Encik Ang Beng Teik,
No. 2, Jalan Kamuning,
Off Jalan Raja Uda,
12300 Butterworth,
Seberang Perai.

The applicant company's challenge of the Industrial Court Award could be summarised and is principally confined to three grounds, namely:

1) The Industrial Court had erred in law and had acted beyond the ambit of its jurisdiction by considering matters which were not referred to it and which the respondent had failed and/or chose not to refer to the Director-General within the 60 days period as required under s. 20(1A) of the Act.

2) The Industrial Court had erred and committed a jurisdictional error by holding that the applicant company had dismissed the respondent and failing to consider clear evidence that it was the respondent who had wrongfully repudiated his contract of employment with the applicant company.

3) If the contents of the letter dated 6 June 1989 constituted dismissal or termination of the respondent's services with the applicant company, yet such dismissal or termination, even without enquiry or proceedings to terminate (summary termination), does not constitute dismissal or termination without just cause or excuse under the law in view of his continued refusal to report for duty on the demoted position.

Taking the first ground first:

Section 20 (1A) is a mandatory and not a directory provision, which states in no uncertain terms that: "The Director-General shall not entertain any representations under sub-section (1) unless such representations are filed within 60 days of the dismissal. " It is this Court's view that the legislature had, in the interests of employees, intended the expression "dismissal" used in s. 20 (1A) of the Act, to also include "constructive dismissal". Clearly, a complaint of constructive dismissal is an available relief under the act, as it is inconceivable that the legislature could have intended to permit a situation whereby e.g. a company employer who intends to get

rid of its manager demotes him to a position of a clerk and then claims that the employee is not dismissed but rather still employed with the company as probably the highest paid clerk in the country.

It was the applicant company's contention that the Industrial Court had considered the question of constructive dismissal of the respondent when it was not seized with this issue in its terms of reference. In order for the Court to consider what was considered and thus, what was the focal point of the Industrial Court's decision, it would be relevant to reproduce the part of the Chairman's speech in the said award, which reads:

> Is the above evidence sufficient to justify the dismissal of the claimant? Certainly no. The company has not called, e.g. Dato' Mak Kok, the managing director of the company to justify the downgrading of the claimant which the claimant had claimed that there was absolutely no justification on the company's part to demote him. Claimant had claimed there was no proof at all of any guilt on his part. The claimant had also challenged the company on the very composition of the panel of inquiry who had found him guilty of charges levelled against him which resulted in his downgrading. In the circumstances it is very relevant on the part of the company to call the chairman of the panel of inquiry and produce the notes taken at the inquiry and the findings of the panel, **to convince this Court** that claimant was properly downgraded and therefore he has no justification in refusing to comply.
>
> Moreover, on the evidence I have before me and on the balance of probability, **I find that there was victimisation** in this case and it appears that the company was all out to get rid of the claimant.
>
> As such, I find that the dismissal was without just cause or excuse.

From the above excerpt, I have no doubt that the Industrial Court had considered the issue of constructive dismissal which the Chairman termed as "down-grading". He even went so far as to say that the respondent was victimised in the downgrading exercise.

The respondent had in his complaint letter dated 20 July 1989 requested for "my reinstatement as general manager of Pan Global Textile Berhad". His Counsel, Mr Shanmugam had also stated that the real issue was reinstatement and the worker had been consistently asking for reinstatement to his former position as general manager. Indeed, before the hearing commenced in the Industrial Court, the respondent had submitted an amended statement of case to bring in the plea of constructive dismissal. Though the Industrial Court had held that "the claimant's claim of constructive dismissal was totally erroneous and therefore the question of jurisdiction did not arise", yet in the same award it was found that the respondent "was merely complaining about his demotion and wanted his job back". This, when considered in conjunction with contents of the respondents aforesaid complaint letter to the Director-General seeking his reinstatement as general manager of Pan Global Textile Berhad, would show that his real complaint was against his constructive dismissal.

The trade dispute that was referred to it was dismissal and not constructive dismissal. This is clear from the award itself which states as follows:

> Thus it is clear that what has been referred to this Court by the Minister for an award in respect of the alleged dismissal which occurred on 6 June 1989 as a result of R5 quoted above and not any other dismissal.

An employee's relief against constructive dismissal and dismissal are entirely distinct and separate reliefs, both being available to the employee under the Act. As such, it is not open to the Industrial Court to deliberate on the question of constructive dismissal when the issue referred to it was dismissal vide letter dated 2 December 1990.

Furthermore, though the Industrial Court had made a finding that there was no constructive dismissal, yet the record show that it had considered and made a finding that "the company had not called e.g. Dato Mah Kok, the Managing Director of the company to justify the downgrading of the claimant.... to call the chairman of the panel of the inquiry and produce notes taken at the Inquiry and the finding of the panel to convince this Court that the claimant was properly downgraded..."

It cannot be disputed that as soon as the respondent was notified of his demoted position, the relief of constructive dismissal was available to him under the Act, and he did not avail himself by seeking that relief within the 60 day period in which to make the representation under s. 20 (1A) of the act. See the cases of *Hotel Perdana Sdn Bhd* (*Kota Bharu) v. Puan Ruth Fam nee Chan Siew Peng* (*Kota Bharu*) [1992] 1 ILR 172 and *National Union of Hotel, Bar & Restaurant Workers v. Rasa Sayang Beach Hotels (Pg) Bhd & Anor.* [1988] 2 MLJ 367. In this regard, it was also submitted by Mr Shanmugam that the calculation of the 60 day period should run from the letter dated 24 May 1989 and not from the letter dated 12 May 1989 which, if so, would bring the respondent's representation to the Director-General to within the 60 day period. I disagree, as it stands to reason that a representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first had official notice of the employer's act which is the essence of his complaint and which he seeks to impugn. In the current case, this would be when the respondent received the letter dated 2 May 1989 from the applicant company requesting him to report for duty on the demoted position of manager (general affairs) on 3 May 1989; and at the very latest it should be when the reminder dated 12 May 1989 was written to him. On the facts and the admitted chronology of events, I hold that the respondent was clearly out of time under s. 20(1A) of the act to make his claim for constructive dismissal; and it was not before the Industrial Court to make any finding on the matter and neither was it referred to it by the minister.

I shall now turn to the perennial issue of the application of s. 30(5) in a reference under s. 20(3) of the Act. Unlike the High Court, an Industrial Court is a creature of Statute; it derives its powers and jurisdiction solely from it's founding statute, and its terms of reference on which it is to function, solely and exclusively from the reference made to it by the Minister. As a Court of reference and to avoid falling into jurisdictional error it should consider only trade disputes referred to it. Though s. 30(5) of the Act enjoins an Industrial Court to "act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form", this provision can only be invoked in its adjudication of the trade dispute/s referred to it. It should not be allowed to cure itself and in effect enlarge its jurisdiction by invoking s. 30(5), otherwise it would negate the very central principle that as a Court of reference its jurisdiction is governed and materially circumscribed by statute as amply postulated by a welter of case authorities.

The question of great interest which the Court may have to ask itself, is how do we reconcile the principle enunciated in *Ernesty Sdn Bhd v. Transport Worker's Union & Anor.* [1986]1 MLJ 18 - which states that the prerequisite to the Industrial Court

assumption of jurisdiction is a reference by the Minister - and the ratio in *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1984] 1 MLJ 363 - wherein it was held that if the Industrial Court asks itself a wrong question or take into account matters which it was not directed to take into account, it would be stepping outside its jurisdiction and would cause its decision to be a nullity - on the one hand, and with the provisions of s. 30(5) of the Act on the other hand. In my view, the effect of this provision would not be in conflict with the ratio in *Ernesty* and *Hotel Equatorial* cases (*ibid*) if s. 30 (5) is interpreted and I do here interpret it to mean that the Industrial Court may deal with matters arising out of matters referred to in considering the substantial merits of the case so long as it restricts itself only to matters within the ambit of the specific relief claimed in the industrial dispute referred to it by the Minister. See my decision in *Malayawata Steel Berhad v. Mohd. Yusof bin Abu Bakar and Anor.* [1994] 2 CLJ 239.

The current case could serve as a good illustration of this interpretation of s. 30(5). As the reliefs sought by a worker for constructive dismissal and dismissal are distinct and separate reliefs in industrial dispute they individually require specific reference by the Minister. The complaint of constructive dismissal was not before the Industrial Court as it neither could have been nor was in fact referred by the Minister. By, not only taking into consideration but - *a fortiori* - also making a finding and having adjudicated on the issue of constructive dismissal (couched as downgrading/demotion) of the respondent, bereft of any reference to it on this specific relief in industrial dispute by the Minister, and indeed, by also being clearly influenced by that consideration into making its decision on the industrial dispute of dismissal (that was in fact referred), the said award has been rendered a nullity and should be quashed. (See *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 1 All ER. 208.) Thus, pithily expressed, the Industrial Court was under a duty to confine its enquiry to the basis of termination *vide* the letter dated 6 January 1989, but by venturing beyond these confines it has acted without jurisdiction and has committed errors in jurisdiction which warrants the award to be quashed; a decision not according to law is no decision at all.

I shall next turn to the second issue of alleged termination or dismissal of the respondent's services by the said letter dated 6 June 1989, this being the specific dispute referred by the Minister to the Industrial Court. The question to ask here is: was there a dismissal? This was a hotly contested issue which was submitted by the applicant company in the alternative.

The Industrial Court in its award stated as follows:

> As stated in CLI p. 35 and p. 38, the reason for terminating claimant's services was because claimant was no longer interested to be employed in the company as he had failed to abide by the company's decision arising from the domestic inquiry. Clearly, the claimant had not abandoned his services but they were summarily terminated for the misconduct of failing to report for duty to a demoted position as decided by the company.
>
> The company did not conduct any disciplinary proceedings as regards to the alleged misconduct. The claimant was not asked to explain as to why he had failed to report for duty in compliance with the decision of the company. He was not given the right to be heard. The company has failed to make an inquiry before terminating the service of the claimant.

The Industrial Court had made a finding of fact that due to the downgrading of the respondent to that of manager (general affairs) with effect from 3 May 1989, the claimant had protested and refused to report for work. At any rate, it is clear from the record and submissions of both Counsels during the hearing, that this was not the case where the respondent was sick at the material period, or was unable to report for duty due to circumstances beyond his control, or that he had not received any of the several aforesaid letters from the applicant company notifying him of his demotion and requiring him to report for duty. In the circumstances, though the respondent may have had valid and justifiable grounds to complain about his constructive dismissal, and perhaps, if he had complained within time and this had been specifically referred to the Industrial Court by the Minister, he may have succeeded, yet since this was not the case, was the Industrial Court justified when applying the facts of the case, in holding:

(i) that the respondent was in fact and in law dismissed and his services terminated summarily, and,

(ii) the company was required to make an inquiry before terminating the services of the respondent.

In short, the Industrial Court had not only misconstrued the law but had also done or failed to do something in the course of its hearing which is of such a nature that its decision is a nullity. It is settled law that unless there is a sufficiently important breach of contract by the employer and the employee's action is in direct and prompt response to the employer's breach (to counter the point of waiver of breach or variation of contract of service), an employee who leaves his work will be held to have resigned and there will be no dismissal within the meaning of the employment legislation at all.

In this regard, I am also fortified by the words in the speech of Lord Denning M.R. who said in the case of *London Transport Executive v. Clarke* [1981] 1.CR 355, as follows:

> .... I would ask this question: can an employee take off - go absent without leave for six months and on returning say to his employer. "You have not dismissed me. I want my job back. "If the employer refuses to take him back, can the man say "By your refusal you have dismissed me. Now I claim for unfair dismissal". Surely in such a case, by taking off for six months without leave, **the man has dismissed himself**. If this be correct when he takes off for six months, it should also be for two months, or as here for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases, he may have left his work undone. But whatever it is, the employer cannot reasonably be expected to take him back. **The man will himself have terminated his contract of employment.**
>
> (Emphasis added).

The duties of the Industrial Court in a reference under s. 20 of the Act, on unjustified dismissal, has been aptly stated in the case of *Wong Chee Keong v. Cathay Organisation (M) Sdn. Bhd* [1988] 1 MLJ 92, thus:

> When the Industrial Court is dealing with a reference under s. 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.

Similarly here, as in *Wong Chee Keong* (*supra*), the Industrial Court is charged with the duty of first considering whether the employee was dismissed. Only having decided that there was dismissal in the true meaning of the word, could the Industrial Court consider if the dismissal by the employer was without just cause or excuse.

The jurisdiction of the Industrial Court to intervene in matters of dismissal begins with the statutory representation by the claimant under s. 20(1) of the Industrial Relations Act 1967 followed by the statutory reference of this specific industrial dispute by the Minister to the Industrial Court. This provision reads:-

> When a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the director general to be reinstated in his former employment....". (emphasis added)

In this context, "former employment" obviously means his former position immediately prior to his dismissal.

In the matter before me, after the respondent was found guilty of several charges against him, and the board of inquiry's recommendation that he be demoted to the position of manager (general affairs) was implemented *vide* the letter dated 2 May 1989 to him, the respondent had the option at that point in time of his receipt of the letter dated 2 May 1989, to refer the matter to the Director-General, since he was unhappy about the composition of the panel of inquiry resulting in his demotion. Instead, he stayed away from work. The act of being absent is itself a misconduct on the part of the respondent. The post-demotion conduct of the applicant as aforesaid makes it unrealistic and unjust for the Court to conclude that the applicant company had repudiated the contract of employment or alternatively had terminated the contract of employment. Indeed, it is the act of the respondent by staying away from work, which evinces an intention of not wanting to continue his employment with the applicant thereby repudiating the contract of employment. This being so, the letter of the applicant dated 6 June 1989 ought to be taken as an acceptance of the repudiation and/or a termination of the contract of employment, when considered in the light of the *London Transport Executive* case. It can be similarly held in this case, having regard to equity and the events of the case, that the applicant company had acted reasonably in treating the repudiatory conduct of the respondent as sufficient reason for accepting the repudiation and thus determining the contract. The respondent absenting himself from work without consent for what he considered was a good reason, is no basis to hold that the respondent did not repudiate his contract of employment. It is crystal clear that the respondent here took no action concerning his unhappiness with the applicant company's earlier decision on his demotion, until forty four (44) days after the applicant company had accepted his repudiatory conduct and the contract of employment was terminated. The aforesaid conduct of the respondent implies that his subsequent action was an afterthought. Perhaps, it was because the time limit stipulated in s. 20(1A) had already expired at the material time, that the respondent did not make a formal complaint on the constructive dismissal and/or demotion to the Director-General pursuant to s. 20(1) Industrial Relations Act 1967.

Is it in the interests of sound commercial climate or good industrial relations to condone the action of an employee who stays away from work when he is demoted

and claim to remain an employee until the company agrees to his request for reinstatement to his former position and benefits? Can we take away an employer's right, if justifiably exercised, to demote an employee? Taking an extreme example, if the employee chooses to stay away from work, without lodging any statutory complaint, for two (2) years after demotion while requesting for reinstatement, what could the employer do to avoid the complaint of having dismissed or constructively dismissed the employee? It cannot be correct either in law or in equity to oblige the employer either to wait indefinitely for the employee's return or to cave-in to his demands. Therefore, the question posed here as to whether the respondent was dismissed as posed in *Wong Chee Keong* (*supra*) - should be answered in the negative. Thus, I held that the applicant company did not dismiss the respondent, who by his failure to report to work had dismissed himself, and the question of whether "dismissal was without just cause or excuse by his employer" did not arise.

The third and last issue is: if there was in fact and in law, termination of the respondents services *vide* the letter dated 6 June 1989, then was the summary termination of the respondents services in the circumstances of the case, tantamount to a dismissal without just cause and excuse? In the case of *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor* [1988] 1 MLJ 111, it was held that the workman who was dismissed for misconduct was lawfully dismissed although no inquiry had been held. The acid test to apply is as expressed in *Dreamland Corporation* (*supra*) thus:

> Where an employer has not followed a proper procedure, the right approach is for the Industrial Tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced? Secondly, have the employers shown that in the light of the information which they have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss.

Upon the facts, the answers to the two questions above, in this matter would also be in the affirmative. The facts that the applicant company did not conduct an enquiry on the conduct of the respondent in not reporting for work is not fatal; there would be no additional information which would be gathered from the enquiry and the decision would have been the same, as the misconduct of the respondent is clear and not unambiguous. Furthermore, had an enquiry been held the respondent would have raised the issue of demotion, and this would not be proper forum for the respondent to do so, considering that the proper forum under the law to raise such issue and to lodge his complaint, would be to the Director-General pursuant to s. 20(1) of the Industrial Relations Act, 1967. The respondent had adopted an attitude of indifference. Would not the action of the employer in such circumstances be justified? Yes it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the employer from taking any action without being accused of having dismissed the employee from his employment.

Upon the above rationale I further held that in the circumstances of this case there was no necessity for the applicant company to carry out any disciplinary proceedings or enquiry before taking the action they did when the respondent refused to report for duty on the demoted position of general affairs manager.

In the event, I held that the Industrial Court had greviously erred in law and in jurisdiction for having:

(i) adjudicated on the question of constructive dismissal of the respondent when this question was not referred to it;

(ii) held that there was a dismissal of the respondent's services with the applicant Company when there was in fact and in law no dismissal;

(iii) held that the alleged dismissal was without just case or excuse because no disciplinary proceedings or enquiry was carried out by the applicant company before terminating the services, when the conduct of the respondent after his demotion did not warrant such proceedings or enquiry.

And I therefore gave order in terms of prayer (i) and (ii) of enclosure 15, quashed the Award 76 of 1993 and awarded costs of this proceedings to the applicant company.